

Money Laundering

A New International Law Enforcement Model

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1 The background of the fight against money laundering

The fight against money laundering aims at a more effective enforcement of the criminal law in relation to profit-oriented crime. This chapter seeks to clarify the background of this fight. It will be shown that the introduction of the two main legal devices that are used in the fight against money laundering, the confiscation of the proceeds from crime and the incrimination of money laundering, are closely linked to changes that occurred on a legal and a socio-economic level. These criminal law instruments have, however, created a momentum of their own. The most important example of how the fight against money laundering has separated itself from the background that gave rise to it is the drastic expansion of the application field of the confiscation of the proceeds from crime and the incrimination of money laundering itself. Whereas the scope of these instruments was originally limited to drug offences or offences related to organised crime, it has now been drastically expanded to cover other, if not all, types of offences. In addition, the international fight against money laundering also signifies an evolution of the norm-making process in the field of law enforcement law.

Legal background

Pecunia non olet,¹ money does not stink. For a long time this seems to have been the prevailing attitude of most criminal justice systems and, in a sense, of most societies in general, towards proceeds from crime. Until quite recently, most criminal justice systems – implicitly if not explicitly – allowed offenders to enjoy the fruits of their crimes. This attitude should be set against the backdrop of the type of offences that criminal courts

¹ Statement attributed to Emperor Vespasianus on raising taxes on public toilets (*Concise Oxford Dictionary of Quotations*, Oxford, 1986, 262).

traditionally had to deal with. When an offence had resulted in damages of any kind, the victim of the offence would most probably institute civil proceedings which would normally result in the restitution of any ill-gotten gains. Some criminal justice systems (e.g. those of Belgium and France) even allow the victim (the *partie civile*) to institute civil claims in the course of the criminal proceedings.

In the post-Second World War era, however, legislators increasingly started to make criminal acts which often did not cause any direct harm to an identifiable victim. A great number of commercial, fiscal or environmental offences are crimes without a victim. Even though this type of offence normally does not result in any direct damage to a victim, this does not mean that offenders do not reap any benefits from these crimes. On the contrary, this type of offence often generates huge profits for whose removal the law generally fails to provide adequate legal mechanisms.

Given the absence of identifiable victims, the only legal instrument which could ensure that offenders were deprived of their illegal profits was the confiscation of the proceeds of crime. Whereas the majority of criminal justice systems were familiar with the more traditional forms of confiscation, namely, the confiscation – often known as forfeiture – of the instruments (*instrumentum sceleris*) or the subject of crime (*objectum sceleris*), most of these systems did not provide for the confiscation of proceeds from crime (*producta/fructa sceleris*). This gap in the law often became painfully clear in the course of criminal proceedings against drug traffickers, for example in the English case of *R. v. Cuthbertson* (1981),² where criminal courts had to acknowledge their lack of competence to take away the profits from crime.

In other countries, such as Belgium,³ where the confiscation of proceeds from crime was provided for in respect of drug offences, this possibility did not extend to other offences. In those countries whose legislation provided for the confiscation of proceeds from crime (e.g. Switzerland and The Netherlands), it was perceived that the provisions concerned did not in practice result in an effective deprivation of the proceeds from crime.⁴

² [1981] AC 470. In this case the court had to acknowledge that section 27(1) of the Misuse of Drugs Act 1971 only allowed for instruments of crime to be forfeited, and did not extend to profits from drug trafficking.

³ See the decision of the Belgian Supreme Court of 4 July 1986 (RDP (1986), 910) based on Article 4, para. 6 of the Belgian Drug Offences Act of 24 February 1921.

⁴ For The Netherlands see L. F. Keyser-Rignalda, *Boef en buit. De ontneming van wederrechtelijk verkregen vermogen* (Arnhem: Gouda Quint, 1994), p. 10. As far as Switzerland is concerned, see C. K. Graber, *Geldwäscherei. Ein Kommentar zu Art.305bis und 305ter StGB* (Berne: Verlag Stämpfli, 1990), p. 95.

One of the first countries to take legislative action in order to fill this gap, was England. Following one of the main recommendations of the *Hodgson Committee*,⁵ Parliament empowered courts to confiscate the proceeds of drug trafficking through the Drug Trafficking Offences Act 1986 (DTOA 1986) later replaced by the Drug Trafficking Act 1994 (DTA 1994).

Urged on by the international initiatives that were taken in this respect at the end of the 1980s (the 1988 UN Convention against Illicit Traffic in Narcotic and Psychotropic Substances⁶ and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime⁷), other countries soon followed suit. Thus the Belgian law of confiscation was changed in 1990,⁸ Dutch law in 1992⁹ while the Luxembourg¹⁰ and Swiss parliaments amended their legislation in respect of confiscation in 1994.¹¹

Criminals who, through their criminal activities, dispose of huge amounts of money, need to give this money a legitimate appearance: they need to 'launder' it. The phenomenon of money laundering is essentially aimed at two goals: preventing 'dirty money' from serving the crimes that generated it, and ensuring that the money can be used without any danger of confiscation. The interest of law enforcement authorities in detecting the link between an offender and the proceeds of the crimes he has allegedly committed, is consequently also twofold: detecting the crimes that were committed in order to bring the alleged perpetrators to trial, and identifying the proceeds from crime so that they can be confiscated.¹²

It is useful to point out that most forms of money laundering eventually

⁵ On the establishment and the functioning of this committee, named after its president, Justice Hodgson, and on its recommendations see A. R. Mitchell, M. G. Hinton and S. M. E. Taylor, *Confiscation* (London: Sweet & Maxwell, 1992), p. xii and D. McClean, *International Judicial Assistance* (Oxford: Clarendon Press, 1992), p. 203 *et seq.*

⁶ Vienna, 20 December 1988, *ILM* (1989), 493.

⁷ Strasbourg, 8 November 1990, *ETS*, No. 141.

⁸ Act of 17 July 1990, amending Articles 42, 43 and 505 of the Belgian Criminal Code. See G. Stessens, *De nationale en internationale bestrijding van het witwassen van geld. Onderzoek naar een meer effectieve bestrijding van de profijtgerichte criminaliteit* (Antwerp: Intersentia, 1997), p. 5.

⁹ Act of 10 December 1992, amending Article 36e of the Dutch Criminal Code. See Keyser-Rignalda, *Boef en Buit*, p. 83.

¹⁰ Act of 13 June 1994, amending Articles 31 and 32 of the Luxembourg Criminal Code. See D. Spielmann, 'La confiscation en droit luxembourgeois à l'aube de la réforme du Code pénal', *Ann.Dr.Louv.* (1995), 202–207.

¹¹ See Act of 14 March 1994, amending Articles 58 and 59 of the Swiss Criminal Code. See N. Schmid, 'Das neue Einziehungsrecht nach StGB Art.58ff.', *RPS* (1995), 322.

¹² See E. Nadelmann, 'Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions', *Inter-American L R* (1986), 34.

result in the injection of 'dirty money' into the legal economy. To attain this goal, the co-operation of third persons is necessary. Irrespective of the specificities of the various domestic legislations in this field, the criminalisation of money laundering – which will be discussed later¹³ – can be generally defined as a criminalisation aimed at disrupting the co-operation provided by third persons in hiding the proceeds from crime and giving those proceeds a legitimate appearance.

Social-economic background: organised crime and drug offences

The need to confiscate the proceeds from crime and to fight money laundering has nowhere been more prominent than in the context of organised crime, and even more specifically, of organised drug trafficking. As was stated in the Note of the Secretary-General of the United Nations on organised crime: 'The connection between organized crime and illicit drug trafficking has changed both the panorama of organised crime and the way criminal justice seems to react to this phenomenon'.¹⁴

Organised crime

Though already known in the United States in the 1920s (and maybe even earlier), organised crime has developed enormously in the second half of the twentieth century, and especially in later decades. There have been numerous attempts to define organised crime, but most definitions are criminological. Given the complex and varied nature of the phenomenon of organised crime, it has proved very difficult to elaborate a precise legal definition.¹⁵ Legal definitions of organised crime often function as a kind of password for the use of far-reaching investigative powers or, on an international level, for relaxing the conditions for international co-operation in criminal matters. Thus the American–Swiss Mutual Assistance Treaty

¹³ See *infra* pp. 82–129.

¹⁴ Secretary-General of the UN, *Note: Strengthening Existing International Co-operation in Crime Prevention and Criminal Justice, including Technical Co-operation in Developing Countries, with Special Emphasis on Combating Organized Crime. Addendum: Money Laundering and Associated Issues: the Need for International Co-operation* (Vienna: UN, 1992), E/CN.15/1992/4/ Add.5, p. 3. On the link between organised crime, drug trafficking and money laundering, see also L. Krauskopf, 'Geldwäscherei und organisiertes Verbrechen als europäische Herausforderung', *RPS* (1991), 386–7.

¹⁵ See in general on this problem: C. L. Blakesley, 'The Criminal Justice System Facing The Challenge of Organised Crime. Section II: The Special Part', *RIDP* (1998), 73–6.

(1973)¹⁶ and the EU Convention on Extradition (1996)¹⁷ remove some of the obstacles (notably the requirement of double incrimination) if the request for co-operation concerns organised crime.

Whereas legal definitions often comprise an enumeration of criteria for organised crime,¹⁸ criminological definitions tend to underline the danger for society emanating from organised crime. It is impossible to give an overview of all definitions that have been given, but most of them have a number of common denominators. Many definitions emphasise the fact that organised crime activities essentially take place in the context of a group. A good example is the definition given by the United Nations in 1992 of an organised crime group as ‘a relatively large group of continuous and controlled criminal entities that carry out crimes for profit and seek to create a system of protection against social control by illegal means such as violence, intimidation, corruption and large-scale theft’.¹⁹ The organised character of this type of crime is also prominent in other definitions.²⁰

Another discerning feature of organised crime is the generation of huge profits. The definition of organised crime given by Interpol’s first symposium on the subject, correctly pinpoints this as the main objective of organised crime.²¹ The enormous turnover realised by organised crime can be explained by various factors, but two of the most important aspects are the following. First, organised crime groups are involved in a crime in

¹⁶ Article 6 of the Treaty on Mutual Assistance in Criminal Matters Between the United States and Switzerland, 25 May 1973, *ILM* (1973), 916 (entered into force on 23 January 1977). See A. Ellis and R. L. Pisani, ‘The United States Treaties on Mutual Assistance in Criminal Matters’, in *International Criminal Law*, ed. M. C. Bassiouni (New York: Transnational Publishers, 1986), pp. 168–9.

¹⁷ See Article 3 of the Convention relating to extradition between the Member States of the European Union, drawn up by the Council Act of 27 September 1996 (*OJ* C 313, 23.10.1996, p. 11).

¹⁸ See P. Bernasconi, ‘La criminalité organisée et d’affaires internationale’, in *Changes in Society, Crime and Criminal Justice in Europe: A Challenge for Criminological Education and Research, Volume II: International Organized and Corporate Crime*, C. Fijnaut, J. Goethals, T. Peters and L. Walgrave (Antwerp: Kluwer, 1995), p. 6; M. Pieth, ‘“Das zweite Paket gegen das Organisierte Verbrechen”, die Überlegungen des Gesetzgebers’, *RPS* (1995), 228; H. Vest, ‘“Organisiertes Kriminalität” – Überlegungen zur Kriminalpolitischen Instrumentalisierung eines Begriffs’, *RPS* (1994), 125 *et seq.*

¹⁹ *Practical Measures Against Organized Crime, Formulated by the International Seminar on Organized Crime*, held at Suzdal, Russian Federation, From 21 to 25 October 1991, Annex II to Ecosoc Resolution 1992/23 of 30 July 1992 concerning organised crime. For a very similar definition, see resolution 1 of the International Association of Penal Law (*AIDP*), Section I of the XVIth Congress (Budapest, 1999), *RIDP* (1999), 895.

²⁰ See, e.g., the definition given by Bernasconi, ‘La criminalité organisée’, 2–5.

²¹ Cited by Blakesley, ‘The Criminal Justice System’, 73.

a structural way in order to make profits. Second, the thrust of their activities is in providing illegal goods and services. Illegal goods and services are often much more expensive than legal goods, especially because the monopoly position of providers of illegal goods and services allows them to make predatory profits. This is not only the case for drug trafficking, but also for arms trafficking, the illegal trade of human organs, child prostitution, etc.

The enormous financial profits from organised crime explain some of the most striking features of organised crime. The egregiously corruptive power of these profits provides organised crime groups with political and economic leverage.²² The influence organised crime may yield on politicians, civil servants and law enforcement authorities can eventually result in a declining belief in two of the most fundamental pillars of modern society: the rule of law and democratic government. The economic consequences of organised crime can scarcely be gauged. Some of the calculations that have been made regarding the turnover of organised crime will be discussed later,²³ but the economic consequences of organised crime go much further than the profits of organised crime. Given the fact that organised crime does not operate along the rules that apply to the market, organised criminals are often able to outpace their legal competitors. Because of their illegal character, the economic activities of organised criminals tend to escape any kind of government control (tax law, administrative law, etc.).

Apart from its political and economic effects,²⁴ the sheer amount of profits made by organised crime also accounts for the pressing need to launder these profits. The relatively small profits realised by traditional crime could in most cases easily be consumed or invested in the legal economy without attracting any attention from law enforcement, fiscal or other authorities. This is not possible any more with regard to the enormous gains from organised crime. Without sophisticated money laundering operations, which give these gains an apparently legitimate origin, the amount of profits of organised crime would in itself be an indication of their illegal origin. As was stated by the former American Attorney-General Edwin A. Meese in 1985 in the House of Representatives: 'Money laundering is the life blood of the drug syndicate and traditional organised crime'.²⁵

²² Bernasconi, 'La Criminalité organisée', 2. ²³ See *infra* pp. 87–9.

²⁴ See in general V. Tanzi, *Money laundering and the international financial system*, IMF Working Paper No 96/55, 14p. and P. J. Quirk, *Macroeconomic implications of money laundering*, IMF Working Paper No 96/66, 33p.

²⁵ Cited by P. Bernasconi, 'Geldwäscherei und organisierte Kriminalität', in *Finanzunterwelt. Gegen Wirtschaftskriminalität und organisiertes Verbrechen* (Zürich: Verlag Orell-Füssli, 1988), p. 26.

In addition, the increasing globalisation and diversification of organised crime makes it necessary for organised crime groups, just as for legal enterprises, to engage in active financial management. The ability to use legal savings and investing instruments (often through financial institutions) inevitably requires money laundering operations. The need for organised crime groups to manage their cash flow becomes especially pressing from the moment organised crime groups start to make profits which they do not need to reinvest in their criminal activities.

Given the intrinsic link between organised crime and money laundering, the incrimination of money laundering itself should be considered as a new tool, or even a new strategy in the fight against organised crime. As the classic criminal law concepts of complicity and of *association de malfaiteurs*²⁶ were often inadequate to fight organised crime groups, some jurisdictions chose to establish membership of an organised crime group²⁷ as an offence, or as an aggravating circumstance, in addition to the common law offence of conspiracy which was already in existence.²⁸ Irrespective of the practical effects of this type of legislation, it can only result in convictions of members of organised crime groups. In most cases it does not fundamentally affect the structure and the illegal activities of these groups as such, as the activities of imprisoned members are carried on by others. Taking into account the low conviction rate and the lucrative nature of organised crime, the deterrent effect of classic sanctions consisting of deprivation of liberty was generally estimated as being very low, although some have argued that this thesis has never been proven with regard to mafia-type organisations because American law enforcement authorities have never consistently targeted them.²⁹

Because the classic tools of the criminal law were perceived to have failed in the fight against organised crime, legislators – with those from the United States in the front rank – considered the confiscation of the proceeds of crime and the incrimination of money laundering as new, more effective tools for tackling the problem of organised crime. These instruments are part of a new strategy against organised crime which is aimed at the structures of organised crime, rather than at deterring individuals from taking part in organised crime. This strategy is directed

²⁶ Illegal association, see, e.g., Article 322 of the Belgian Criminal Code and Article 450 of the New French Criminal Code.

²⁷ See, e.g., Article 416bis of the Italian Criminal Code (*associazione per delinquere e di tipo mafioso*), Article 260ter of the Swiss Penal Code and Article 324bis of the Belgian Criminal Code.

²⁸ On these different legislative approaches towards organised crime, see Blakesley, 'The Criminal Justice System', 73–80.

²⁹ D. J. Fried, 'Rationalizing Criminal Forfeiture', *J.Cr.L. & Crim.* (1988), 367–72.

at the crucial function of organised crime: making money. By taking away the proceeds from crime and by making it more difficult to launder its proceeds, law enforcement authorities not only take away the incentive for organised crime, but, more importantly, seek to disrupt the functioning of organised crime itself. Organised crime groups depend on cash and assets to function just as much as their legitimate counterparts do.

Drug offences

The production, trafficking and consumption of narcotic and psychotropic drugs are one of the biggest problems faced by contemporary society, both on a domestic and an international level. Already at the beginning of the twentieth century, international initiatives were being taken to control the use of drugs. Between 1912 and 1972 no less than 12 multilateral conventions were adopted with regard to the regulation of drugs,³⁰ submitting the production and selling of drugs to state control and restricting its use to certain, mostly medical, purposes. The 1961 UN Single Drug Convention, supplemented by the 1972 Protocol, consolidated most of the preceding conventions. The 1971 UN Convention on Psychotropic Substances³¹ complemented this by establishing an international regulation of chemical and pharmaceutical drugs.³²

The main purpose behind this international regulation system of drugs was to limit the supply of drugs, and thereby to limit the use of drugs and the drug problem in general. The enormous social dimensions of the drug problem in many countries have, however, undermined this strategy. Whereas drugs were originally seen as an almost exclusively medical problem of drug users, the scope of the production, use and trafficking of drugs is nowadays of such a nature that drugs have come to be seen as a problem for society as a whole. Various factors account for this. In drug producing countries, it is sometimes hard to underestimate the economic and political clout of drug traffickers. In this respect, the terms 'narco-democracies' and 'narco-cracies' have even been coined to denote the

³⁰ For an overview of these conventions, see M. C. Bassiouni, 'Critical Reflections on International and National Control of Drugs', *Denv.JInt'l L & Pol'y* (1990), 312–3, footnote 3. See also S. Glaser, *Droit Pénal International Conventionnel* (Brussels: Bruylant, 1970), pp. 133–39 and P. Stewart, 'Internationalising The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances', *Denv.JInt'l L & Pol'y* (1990), 388–90. ³¹ Vienna, 21 February 1971, *ILM* (1971), 261.

³² For an explanation as to the lack of an international regulation system regarding chemical and pharmaceutical drugs up till that date see Bassiouni, 'Critical Reflections on Control of Drugs', 314.

influence of drug trafficking.³³ In addition, drug trafficking is often connected to other criminal phenomena, such as corruption and terrorism. All these factors resulted in an increasing awareness for policy makers that drugs cannot be curbed simply by attacking the supply and demand side but also in a third way, by attacking drug trafficking. It was hoped that by attacking drug trafficking, law enforcement authorities would be able to cut the link between the supply and the demand side. Given the huge scale of organised drug trafficking, this fight was directed against the profits of drug trafficking. The legal tools used in this respect are the confiscation of proceeds from crime and the criminalisation of money laundering. The introduction of these two instruments in the legislation of the United States and that of many other countries was initially closely linked to the fight against drug trafficking. The fight against money laundering was not just a new strategy in the fight against crime, but also in the fight against drug trafficking.

This changing awareness with respect to the drug problem was also reflected in the nature of the relevant international conventions. The early drug conventions were basically concerned with the administrative regulation of the production and transport of drugs, but there were no enforcement conventions. The penal provisions featuring in those early conventions were aimed at supporting the administrative regulation established by these conventions. The 1988 UN Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances was in effect the first convention to emphasise the law enforcement aspects of the fight against drugs.³⁴

Expansion of the application field to other offences

Although the introduction of the confiscation of the proceeds of crime and the criminalisation of money laundering was part of a new criminal justice strategy aimed at fighting organised crime and, even more specifically, drug trafficking, in many domestic laws the application field of these legal tools has now been drastically expanded. Whereas the criminalisation of money laundering was originally often limited to proceeds from drug trafficking, many legislators have now broadened its application field to the proceeds from many offences (not limited to organised crime), or even all offences. This means that the group of ‘predicate

³³ E. A. Nadelmann, *Cops Across Borders. The Internationalization of US Criminal Law Enforcement* (Pennsylvania: The Pennsylvania State University Press, 1993), pp. 251–312, especially p. 271. ³⁴ McClean, *International Judicial Assistance*, pp. 172–4.

offences' (*infraction principale, Katalogstraftat, hoofdmisdrijf*), that is, the original offence that generated the proceeds in the first place, is not limited any more to drug offences. The confiscation of the proceeds of crime and the criminalisation of money laundering have undergone a profound evolution in this respect: from instruments designed to fight organised crime, they have now become general law enforcement tools that can be used in almost any case. They have in a sense inaugurated a new criminal justice policy, which is oriented towards the financial profits from crime. This new policy strives to curb crime by taking away the profits of crime, rather than by punishing the individuals who have allegedly committed the crimes. Various factors contribute to an explanation of this evolution.

A first factor relates to the phenomenon of organised crime. Although drug trafficking is the best known type of organised crime, it is not the only activity of organised crime groups. On the contrary, it has become increasingly clear that organised crime has diversified its activities, so that its profits are not exclusively derived from drug offences. Legislators, and for that matter lawyers in general, have grappled for a long time with the concept of organised crime without being able to come up with a precise definition capable of encompassing any form of organised crime. Lest any type of organised crime should fall outside the scope of the criminalisation of money laundering, many legislators have broadened the application field of this criminalisation to all serious offences or even to all offences.

This broadening is also a consequence of the fact that many profitable forms of crime – such as arms trafficking, environmental crime, illegal trade in cultural property etc. – are now high on the international political agenda.³⁵ This is connected to the geo-political argument: whereas the fight against drug trafficking is especially promoted by the western world, notably by the United States, many African and Asian countries are more interested in fighting the laundering of flight capital. This helps to explain why the provisions of the Commonwealth Scheme on Mutual Assistance in Criminal Matters regarding mutual assistance in the field of proceeds of crime also extend to offences other than drug offences.³⁶

A third impulse for this evolution has come from the phenomenon of money laundering itself. Bernasconi has astutely pointed out that money

³⁵ W. C. Gilmore, 'International Initiatives', in *Butterworths International Guide to Money Laundering Law and Practice*, ed. R. Parlour (London: Butterworths, 1995), p. 15.

³⁶ Harare, July 1986, amended at the Commonwealth Law Ministers Meeting, Christchurch, New Zealand, 23–27 April 1990. See B. Rider, 'Launderers and Whistle-Blowers', *Co.L.* (1992), 202.

laundering constitutes the Achilles' heel of organised crime, as it forces organised crime groups to co-operate with the institutions from the legal economy.³⁷ Because money laundering operations often require a highly technical know-how and access to legal businesses and institutions such as banks, members of organised crime sometimes call on established businessmen to launder their ill-gotten gains. In this way the money laundering phenomenon is able to spread from organised crime to the legitimate business world and may provoke other economic crimes on behalf of certain businessmen.³⁸ This constitutes an example of the corruptive influence of organised crime. It would therefore be contradictory if only the laundering of proceeds from organised crime were punishable and the laundering of the proceeds from related criminal activities (e.g. corruption or swindling) were not punishable. In order to take away not only the proceeds from the organised crime groups, but also from the businessmen – the launderers, who have become accomplices of the criminals – it is sometimes necessary to expand the application field of the confiscation of proceeds from crime and the criminalisation of money laundering. In this context it is also interesting to learn that the investigation of criminal groups and of the laundering of their ill-gotten gains are often two quite distinct investigation targets.³⁹

A fourth argument in favour of an expansion of the range of predicate offences touches on the efficacy of the fight against money laundering. The original limitation of the application field of the incrimination of money laundering to drug offences, or to the most serious predicate offences, was often justified by an economic argument, namely that law enforcement authorities and the courts have neither the time nor the means to investigate all types of money laundering with regard to the proceeds of any kind of predicate offence. Regardless of the veracity of this statement, it is not certain whether this should automatically lead to a limited application field. Even if one conceives the criminalisation of money laundering as a tool to be used exclusively for the purpose of fighting organised crime, a limitation of the application field to predicate offences connected with drug trafficking could give rise to practical difficulties. Not only would the laundering of the proceeds of some organised

³⁷ Bernasconi, 'La Criminalité organisée', 7–8 and 'Geldwäscherei und organisierte Kriminalität', 28–9.

³⁸ See L. Paoli, 'The Banco Ambrosiano Case: an Investigation Into the Underestimation of the Relations between Organised and Economic Crime', *Crime, Law & Social Change* (1995), 345–65 and especially 349–51.

³⁹ United Nations Office for Drug Control and Crime Prevention, *Financial Havens, Banking Secrecy and Money-Laundering* (New York: United Nations, 1998), 12.

crime activities obviously stay immune, but the limitation could also create problems of an evidential nature. Often the proceeds of various activities of organised crime groups are intermingled, with the result that the proceeds from drug trafficking cannot be separated from other proceeds, or cannot even be calculated.⁴⁰ In order to avoid this, the application field of the incrimination of money laundering should include as many predicate offences as possible. Here we come to the heart of the matter: regardless of the criminal policy that law enforcement authorities choose to adopt with respect to money laundering, legislation should sanction any kind of money laundering and permit confiscation of the proceeds of any kind of crime. The limitation of confiscation and money laundering legislation is likely to hamper the efficacy of law enforcement actions. A limitation of the application field of a money laundering incrimination to some predicate offences is prone to cause technical legal difficulties which may impede the fight against money laundering.⁴¹ Thus defendants may argue that, although they suspected that the proceeds were criminally sourced, they thought that the proceeds were derived from an offence falling outside the scope of predicate offences covered by the incrimination. On an international level, the variety of the domestic money laundering laws relating to the range of predicate offences may hamper international co-operation for lack of double criminality.⁴²

Finally, it may be pointed out that a limitation of the application field of the incrimination of money laundering to drug related predicate offences also runs into a moral objection: from an ethical point of view it is hard to understand why the laundering of drug proceeds should be criminalised and not the laundering of, say the proceeds of environmental offences. On a macro-political level, as long as some criminal funds (notably those stemming from tax evasion) may be 'laundered' legally, some (offshore) financial centres will be able to argue that their financial infrastructure which allows them to hide funds, has a legitimate purpose.⁴³

Transformations of the norm-making process

The development of a set of norms designed to tackle money laundering and, more generally, to result in a more effective punishment of acqui-

⁴⁰ See Recommendation 18 of the Aruba Report of FATF and Secretary-General of the UN, *Note: Strengthening Existing International Co-operation*, 18.

⁴¹ See *infra* pp. 117–21. ⁴² See *infra* pp. 289–92.

⁴³ United Nations Office for Drug Control and Crime Prevention, *Financial Havens, Banking Secrecy and Money Laundering*, 66.

tive crime, has brought about a number of transformations that pertain to the way the law itself is shaped. The thesis which will be expounded in the following pages is that the fight against money laundering is significant of two very important evolutions in the norm-making process, namely the influence of soft law and the international impetus for the creation of anti-money laundering law. Some of the effects of these transformations of the legislative process will be illustrated with respect to the European Money Laundering Directive. These evolutions are especially notable as they take place in field of law enforcement, traditionally considered the exclusive 'playground' of national courts and parliaments.

The influence of soft law

Notwithstanding the prerogatives of parliaments to criminalise acts of money laundering, the fight against money laundering has been deeply influenced by a number of so-called 'soft' law instruments. The term 'soft law' refers to the lack of justiciability of the instruments in which the rules are enshrined (*instrumentum*), rather than to the content of the rules themselves (*negotium*).⁴⁴

An important factor which explains the role of soft law in the fight against money laundering, is the aversion to government interference financial institutions have often displayed. In some countries, money laundering was initially fought, not through legislative measures, but via codes of conduct (see, e.g., Switzerland⁴⁵) or by regulatory measures issued by banking supervisors. The content of a number of initiatives to curb money laundering was thus highly influenced by the financial sector itself. Although this did not prevent parliament from taking action, as was in effect done in many countries later on, the influence of these initiatives on subsequent legislation has in some cases been very clear. Although the practice of involving financial institutions themselves in the drafting of the regulations with which they have to comply has been subjected to criticism by some,⁴⁶ others look upon it as a useful practice, because the persuasive force of a rule is often more important than its binding nature.⁴⁷ This view has also been espoused by the UN Commission on Crime Prevention and Criminal Justice:

⁴⁴ G. Abi-Saab, 'Eloge du "droit assourdi". Quelques réflexions sur le rôle de la *soft law* en droit international contemporain', in *Nouveaux itinéraires en droit. Hommage à François Rigaux* (Brussels: Bruylant, 1993) pp. 62–3. ⁴⁵ See *infra* pp. 101–3.

⁴⁶ See, e.g., B. Rider, 'Cosmetics or Surgery – Fraud in the City', *Co.L* (1992), 162.

⁴⁷ M. Elvinger, 'Libres propos sur l'utilité d'un code de bonne conduite en matière bancaire', in *Droit Bancaire et financier au Grand-Duché de Luxembourg* (Brussels: Larcier, 1994), I, p. 598.

It could be said that policies and strategies against the laundering of the proceeds of crime should have as one of their prime objectives the creation of an atmosphere of consensus regarding the measures to be devised and implemented. The financial institutions should be parties to that process and consensus. It remains the prerogative of Governments to adopt and implement measures of a legislative and regulatory nature. Financial institutions should be consulted, however, in view of their immediate involvement, and should share the burden of efforts against the laundering of proceeds of crime.⁴⁸

Given the absence of a formal international legislator, it is not surprising that the influence of soft law has been especially notable on the international level.⁴⁹ The contribution of international soft law instruments to the fight against money laundering is impressive. One of the earliest international initiatives undertaken in the field of money laundering was the Recommendation No.R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27 June 1980 entitled 'Measures against the transfer and safeguarding of the funds of criminal origin'.

The first international instrument to address the issue of money laundering specifically was the Basle Statement of Principles of 12 December 1988, issued by the Basle Committee on Banking Regulations and Supervisory Practices.⁵⁰ The Basle Committee, which comprises the authorities charged with banking supervision of twelve western countries,⁵¹ thought it necessary to take action against money laundering lest public confidence, and hence the stability of banks, should be undermined by adverse publicity as a result of inadvertent association by banks with criminals. Regardless of the fact that the primary function of banking supervision is to maintain overall the financial stability of the banking system rather than to ensure that individual financial transactions are legitimate, the supervisors thought that they could not stay indifferent to the use made of banks by criminals.

The Statement contains a number of ethical principles and good banking practices, such as the know-your-customer rule, but, as the pre-

⁴⁸ UN Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Review of Priority Themes, Control of Proceeds of Crime—Report of the Secretary-General* (Vienna, 13–23 April 1993, E/CN.15/1993) p. 14.

⁴⁹ See also O. R. Young, 'International Regimes: Problems of Concept Formation', *World Politics* (1980), 333.

⁵⁰ 'Statement on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (hereinafter referred to as the Basle Statement of Principles)', reproduced in W. C. Gilmore (ed.), *International Efforts To Combat Money Laundering* (Cambridge: Grotius Publications, 1992), p. 273.

⁵¹ Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the UK and the USA.

amble explicitly states: '[it] is not a legal document, and its implementation will depend on national practice and law'. Notwithstanding its non-binding character, the Statement was made indirectly binding upon the financial institutions in various countries.⁵² Different legal techniques were used to this end: sometimes the legislator referred to the Statement (Luxembourg) or financial institutions committed themselves to respect the principles laid down in the statement (Switzerland and Austria), or supervisory authorities indicated that they would punish infringements of the said principles (Belgium,⁵³ France, the UK⁵⁴). It is thus clear that, although soft law, the Basle Statement of Principles had a very marked influence on the fight against money laundering. In most countries it has now been superseded by legislation on the prevention of the misuse of financial institutions for the purposes of money laundering, but the Statement, however, played a pioneer role: as often with soft law, it provided a framework of rules in an area where formal legislation was still lacking.⁵⁵

The crown jewel of soft law, however, is the set of forty recommendations issued by the Financial Action Task Force on money laundering (FATF) in 1990. At the 1989 Paris summit of the seven most industrialised nations in the world (G7), and in the presence of the President of the European Commission, this working party was established. Its remit was '... to assess the results of co-operation already undertaken in order to prevent the utilisation of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems as to enhance multilateral judicial assistance.'⁵⁶

The first report of the FATF was issued in 1990 and contained an analysis of the extent and nature of the money laundering process and an overview of the programmes already in place to combat money laundering. Its most extensive and influential part, however, is the 40 recommendations

⁵² FATF-I, 11.

⁵³ See A. De Nauw, *Les métamorphoses administratives du droit pénal de l'entreprise* (Ghent: Mys & Breesch, 1994), p. 132.

⁵⁴ As far as the UK is concerned, the Bank of England controls the respect for the Basle Statement when deciding on the extension of bank licences: J. Drage, 'Countering Money Laundering: The Response of the Financial Sector', in *Money Laundering*, ed. The David Hume Institute (Edinburgh: Edinburgh University Press, 1993), p. 62.

⁵⁵ Abi-Saab, 'Eloge du "droit assourdi"', 65 and J. Pardon, 'Déontologie des opérations bancaires et financières', *Revue de l'économie financière* (1993) 51–2.

⁵⁶ 'Group of Seven Economic Declaration of 16 July 1989', reproduced in W. C. Gilmore (ed.), *International Efforts To Combat Money Laundering* (Cambridge: Grotius Publications, 1992), p. 3.

which embrace both the repressive fight against money laundering and the enhancement of the role of the financial system in fighting money laundering.

Originally only fifteen countries participated, but membership was enlarged to twenty-six countries and two international institutions (the European Commission and the Gulf Co-operation Council).⁵⁷ The recommendations are no more and no less than recommendations: non-binding soft law. It was a deliberate choice not to cast the recommendations into the mould of a treaty. This was to avoid elaborate ratification procedures and to allow flexible adaptation of the recommendations, as was done in 1996. Flexibility was also the motive behind the loose structure of the FATF, which is merely a working party, supported by the OECD Secretariat in Paris. Since 1991, the FATF has issued annual reports which contain mutual evaluations, carried out by other member states of the FATF, of the legislative and regulatory measures member states have put in place to fight money laundering.

The FATF recommendations often functioned as *droit vert*,⁵⁸ provisions which help shape domestic legislation, with regard to money laundering. The recommendations also yield their unifying influence through the EC Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering: no less than fifteen FATF recommendations found their way to the EC Directive, which made them into binding law for EC Member States.⁵⁹

The internationalisation of law enforcement

Given the inherent transnational nature of the money laundering phenomenon, an international response was required. Various international organisations have engaged in the fight against money laundering, sometimes issuing recommendations, directives, or drafting international conventions. Some authors have referred to an international regime in this respect⁶⁰ (a term which seems to have been coined by Robert Keohane and

⁵⁷ On the origin, the membership, structure and functioning of FATF, see W. C. Gilmore, *Dirty Money. The Evolution of Money Laundering Counter-Measures* (Strasbourg: The Council of Europe Press, 1995) pp. 93–8.

⁵⁸ According to Abi-Saab, 'Eloge du "droit assourdi"', 65, this term was coined by Professor René-Jean Dupuy. ⁵⁹ See FATF-II, 38.

⁶⁰ B. Zagaris and E. Kingma, 'Asset Forfeiture Under International and Foreign Law: An Emerging Regime', *Emory Int'l L.Rev.* (1991), 446 *et seq.* and S. B. McDonald, 'Frontiers for International Money Regulation After BCCI: International Co-operation or Fragmentation', contribution in *Am.Soc'y Int'l L.Proc.* (1992), 191.

Joseph Nye⁶¹). Although the concept is derived from international economics and political science, it can also be applied in the sphere of international law enforcement. An international law enforcement regime can be defined as: 'a global arrangement among governments to co-operate against particular transnational crimes'.⁶² The term 'international law enforcement regime' should, however, not be confused with the enforcement of international law. The predicate 'international' only pertains to the international co-operation in the enforcement of municipal criminal law. Sometimes, as is the case with money laundering, the relevant domestic provisions will have been inspired by international conventions, but this does not alter the principal fact that it is still domestic criminal law that is being enforced.

The fact that a domestic criminal offence is rooted in, or at least has a counterpart in, an international convention, of course makes international co-operation much easier. When a government of one state wants to enforce internationally a transnational crime, it will try to make this offence illegal under international law. Making a type of (transnational) behaviour illegal under international law is only one part of international law enforcement regime. One can distinguish between the substantive and procedural dimensions of an international law enforcement regime, which, to a large extent, coincide, with the substantive and procedural dimensions of international criminal law. That certain conduct is considered an international offence mostly follows from an international convention, but can also follow from customary practices amongst states (customary law). Sometimes an international law enforcement regime also includes the creation of extraterritorial jurisdiction (another aspect of substantive international criminal law).⁶³ The procedural dimension of international criminal law relates to international co-operation amongst municipal police and judicial authorities, to combat transnational crime. International conventions establishing an international offence will often also provide the legal foundation required for international

⁶¹ See R. O. Keohane and J. Nye, *Transnational Relations and World Politics* (1972); R. O. Keohane and J. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown & Co., 1977) and R. O. Keohane and J. Nye, *After Hegemony: Co-operation and Discord in the World Political Economy* (1984).

⁶² E. Nadelmann, *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement*, PhD thesis, University of Pennsylvania, p. 22.

⁶³ The link between an international offence and the establishment of extraterritorial jurisdiction is often surrounded by confusion. See C. Van den Wyngaert, 'Double Criminality as a Requirement to Jurisdiction', in *Double Criminality, Studies in International Criminal law* (Uppsala: Iustus Förlag, 1989), pp. 47–8.

co-operation to fight this type of crime, as is the case, for example, in the context of money laundering.⁶⁴

The influence of an international anti-money laundering regime in shaping domestic money laundering law should not be underestimated and has indeed been instrumental. The international anti-money laundering regime is, however, not a universal, homogeneous bloc but is instead composed of different layers, some of them universal, others regional. The most universal layer is provided by the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the influence of which is difficult to overestimate. In making the laundering of drug proceeds an international offence under this convention, the role of the United States, the first country to incriminate money laundering,⁶⁵ was instrumental.⁶⁶ Although the 1998 UN Convention is the most global instrument, the United Nations expressly call on states to establish or strengthen regional or subregional instruments and mechanisms.⁶⁷ Other instruments have been forged in the context of regional co-operation mechanisms.

The most prominent example is that of the FATF which was started as a 'regional' initiative, but whose influence has been extended to non-FATF members and which now has world-wide influence. The FATF is effectively striving to set up a world-wide anti-money laundering network. Not only is the FATF, presently made up of 26 mainly 'western' countries, studying the possibility of extending its membership, it has also been actively engaged in the development of FATF-style regional bodies, thus aiming to extend the reach of its recommendations against money laundering beyond its membership. Thus a Caribbean Financial Action Task Force (CFATF) as well as an Asia/Pacific Group on Money Laundering have been set up with support of the FATF.⁶⁸ Moreover, the FATF also closely works together with other relevant international organisations, such as the United Nations Office for Drug Control and Crime Prevention.⁶⁹ Likewise,

⁶⁴ The jurisdictional questions surrounding money laundering will be discussed in Part III and the international co-operation in criminal matters regarding money laundering in Part IV. ⁶⁵ See *infra* pp. 99–100.

⁶⁶ See E. Nadelmann, *Cops Across Borders. The Internationalization of US Criminal Law Enforcement*, PhD thesis, University of Pennsylvania, p. 13.

⁶⁷ See Point 8 of the Political Declaration against Money Laundering, adopted at the Twentieth Special Session of the United Nations General Assembly devoted to 'countering the world drug problem together', New York, 10 June 1998.

⁶⁸ See, amongst others, Report of the Caribbean Drug Money Laundering Conference published at W. C. Gilmore, *International Efforts To Combat Money Laundering*, p. 25 and FATF-VIII, pp. 22–3. See in general the annual reports published by the CFATF.

⁶⁹ See FATF-IX, p. 4.

the European Union has been making considerable efforts to export the *acquis* of the European Money Laundering Directive to other parts of the world. The spatial application field of the Directive has been extended to Iceland, Norway and Liechtenstein under the European Economic Area Agreement.⁷⁰ In addition, all of the Association Agreements contain an article committing the signatories to combating money laundering in line with the Directive and other international instruments. The European Union also provides assistance in the field of anti-money laundering measures to central and eastern European countries and to 'new independent states', as well as to other countries (e.g. the Andean Community).⁷¹

Other regional efforts to combat money laundering have been undertaken by the Organisation of American States (OAS) and the Commonwealth. In 1992, the Inter-American Drug Abuse Control Commission (CICAD) of the OAS issued the 'Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking, Related and Other Serious Offenses' (amended in 1997 and hereinafter referred to as the CICAD Model Regulations⁷²). The 1986 Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters makes, amongst others, explicit provision for international co-operation in the field of seizure and confiscation.⁷³ The Commonwealth Secretariat also drafted a Money Laundering Model Law.

As will already be clear from the above, apart from conventions and other binding international legal instruments, soft law plays an important role in this international anti-money laundering regime. Sometimes

⁷⁰ See, e.g., Article 36 of the Agreement on the European Economic Area (Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, *OJ*, L 001, p. 1, 3.01.1994), the appendixes of which explicitly refer to the Money Laundering Directive as an example of the *acquis communautaire*. See also the *Report of the EFTA Surveillance Authority on the implementation of the Money Laundering Directive by Iceland, Liechtenstein and Norway* (Brussels, 1998), p. 69.

⁷¹ *Second Commission report to the European Parliament and to the Council on the Implementation of the Money Laundering Directive*, (Luxembourg: Office for Official Publications of the European Communities, 1998), COM(1998) 401 final, pp. 5-7.

⁷² X., 'OAS Strengthens Anti-Money Laundering Efforts', *Int'l L. Enf. R.* (1998), pp. 260-4.

⁷³ Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including Amendments made by Law Ministers in April 1990, reproduced in C. Van den Wyngaert and G. Stessens (eds.), *International Criminal Law. A Collection of International and European Instruments* (The Hague: Kluwer Law International, 1996), p. 345. See D. McLean, 'Mutual Assistance in Criminal Matters: The Commonwealth Initiative', *ICLQ* (1988), 177-88.

an organisation may wish to pursue both strands. Thus, the travails carried out under the aegis of the United Nations have not only spawned the 1988 Convention, but also the Optional Protocol to the UN Model Treaty on Mutual Assistance in Criminal Matters concerning the Proceeds of Crime⁷⁴ and the Model Law on Money Laundering, Confiscation and International Co-operation in Relation to Drugs.⁷⁵ Both instruments contain a number of provisions regarding international co-operation on identification, seizure and confiscation of proceeds from crime. The latter instrument also deals with purely domestic issues in the context of confiscation and money laundering, but is, unlike the former, restricted to proceeds from drug trafficking. Other than the Vienna Convention, the Protocol and the Model Law is only model legislation (i.e. soft law) and cannot function as a basis for international co-operation between states.

Likewise, the activities of the European Union in the field of anti-money laundering policies have not only resulted in the Money Laundering Directive, which is directly binding on all fifteen Member States, but also in the Joint Action of 3 December 1998 concerning arrangements for co-operation between Member States in respect of identification, tracing, freezing or seizing and confiscation of instrumentalities and the proceeds from crime,⁷⁶ which has a much less binding legal status.

Some of the most important legal instruments of the international anti-money laundering regime will be often referred to throughout this book. For the sake of clarity, they will now be discussed briefly.

The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Following a call from the UN Secretary-General, the UN General Assembly decided to convene a world conference at the ministerial level to deal with all aspects of drug abuse. The conference was held in Vienna from 17 through 26 June 1987 and resulted in the adoption of a Comprehensive Outline of Future Activities in Drug Abuse Control.⁷⁷ The Outline is an ambitious document, which sets out the various efforts the United Nations plan to undertake in order to curb the world-wide drug problem. The four chapters of the outline cover the main aspects of the fight against drug abuse and illicit trafficking: the prevention and reduction of illicit

⁷⁴ ILM, 1991, 1432. See also Van den Wyngaert and Stessens (eds.), *International Criminal Law. A Collection of International and European Instruments*, p. 319.

⁷⁵ United Nations International Drug Control Programme (UNDCP), Legal Advisory Programme, November 1995. ⁷⁶ OJ No. L 333, 09.12.1998, p. 1.

⁷⁷ ILM (1987), 1637-724.